Supreme Court, U.S.
FILED
JUL 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85—2106

In The Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

v.

PI KAPPA ALPHA FRATERNITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

GENE W. HOLLIKER
Assistant Attorney General
Counsel of Record

THOMAS J. O'CONNELL
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

ATTORNEYS FOR AMICUS CURIAE STATE OF OHIO

15 pp

QUESTION PRESENTED

DOES THE FOURTH AMENDMENT PROHIBIT AN UNDER-COVER AGENT FROM USING DECEPTION IN ORDER TO SECURE AN INVITATION INTO THE HOME OF A CRIMINAL SUSPECT?

PARTIES

PETITIONER:

State of Ohio

RESPONDENT:

Pi Kappa Alpha Fraternity

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
TABLE OF AUTHORITIES iii
JURISDICTION 2
STATEMENT OF INTEREST 2
SUMMARY OF ARGUMENT 2
ARGUMENT

I. THE DECISION OF THE OHIO SUPREME COURT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *LEWIS v. UNITED STATES*, 385 U.S. 206 (1966) AND *HOFFA v. UNITED STATES*, 385 U.S. 293 (1966) 4

II. THE OHIO SUPREME COURT'S DECISION WILL SERIOUSLY IMPAIR THE STATE'S ABILITY TO ENFORCE ITS VICE LAWS 7

CONCLUSION 9
CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Page

Cases:

Hoffa v. United States,
385 U.S. 293 (1966) 4, 6, 7

Jones v. Berry,
722 F.2d 443 (9th Cir. 1983)
cert. denied, 104 Sup.Ct. 2343 (1984) 6

Katz v. United States,
389 U.S. 347 (1967) 5

Lewis v. United States,
385 U.S. 206 (1966) ..... 2 - 8

Maryland v. Macon,
105 S.Ct. 2778 (1985) 8

Michigan v. Long,
463 U.S. 1032 (1983) 2

Ohio v. Johnson,
467 U.S. 493 (1984) 2

State v. Pi Kappa Alpha Fraternity,
23 Ohio St.3d 141 (1986) 1, 5

United States v. Schuster,
684 F.2d 744 (11th Cir. 1982),
cert. denied, 104 Sup.Ct. 1008 (1984) 6

United States v. Shields,
675 F.2d 1152 (11th Cir.)
cert. denied, 459 U.S. 858 (1982) 6

Statutes:

28 U.S.C. § 1257(3) 2

Others:

Webster, *Sophisticated Surveillance — Intolerable Intrusion or Prudent Protection?*
63 Wash. U.L.Q. 351 (1985) 8

CASE NO. 85—2106

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

v.

PI KAPPA ALPHA FRATERNITY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus, State of Ohio, pursuant to Supreme Court Rule 36.4, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered on April 23, 1986, in *State v. Pi Kappa Alpha Fraternity*, 23 Ohio St.3d 141 (1986).

JURISDICTION

The decision of the Supreme Court of Ohio was entered on April 23, 1986. Jurisdiction is conferred pursuant to 28 U.S.C. § 1257(3).

The syllabus of the Ohio Supreme Court's opinion makes references to both the Ohio Constitution and to federal case law. Accordingly, it is necessary to review the jurisdictional presumption promulgated in *Michigan v. Long,* 463 U.S. 1032 (1983). Pursuant to *Long,* this Court will assume that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Id.* at 1042.

It is clear that this jurisdictional presumption should prevail in light of the opinion rendered in the instant case.[1] The Ohio Supreme Court's holding rested on its interpretation of *Lewis v. United States,* 385 U.S. 206 (1966). The court cited only one Ohio case and this was done after it had disposed of the critical issue raised by *Lewis.* Accordingly, under *Long,* it must be presumed that this case presents a federal constitutional question.

STATEMENT OF INTEREST

This case presents the Court with the opportunity to review the application of *Lewis v. United States,* 385 U.S. 206 (1966) in which this Court held that the Fourth Amendment does not require the suppression of evidence that is obtained by an undercover agent's warrantless entry into a defendant's home.

In its opinion, the Ohio Supreme Court held that it was a violation of the Fourth Amendment for two undercover agents

---

[1]Although Ohio law provides that the syllabus of a decision is controlling, this Court has previously held that it is appropriate to analyze the full text of the opinion when the syllabus is ambiguous as to whether the case was decided on state or federal grounds. *Ohio v. Johnson,* 467 U.S. 493, n.7 (1984).

to misrepresent their identities in order to obtain an invitation into a fraternity house which was suspected of being in violation of various liquor laws. In arriving at this conclusion, the court construed *Lewis* to mean that an undercover agent can use deception to get into a home only when the home has been converted into a commercial center of criminal activity and the agent is invited in for the purpose of transacting illegal business.

The restriction that the Ohio Supreme Court has sought to impose on the use of undercover investigations will be gravely detrimental to the state's ability to enforce its vice laws. Specifically, the state's efforts to curtail illegal drug sales and use will be significantly impaired since it is often necessary for undercover agents to enter a suspect's home in order to consumate a drug sale. Because this decision has state-wide application, the amicus, as the law enforcement arm of the state, has a substantial interest in the resolution of the question presented in the instant case.[2]

SUMMARY OF ARGUMENT

The opinion of the Ohio Supreme Court is clearly flawed by a too narrow reading of *Lewis v. United States,* 385 U.S. 206 (1966). *Lewis* was not meant to preclude undercover agents from entering homes which have not been converted into commercial centers of criminal activity. Rather, *Lewis* and subsequent Fourth Amendment cases indicate that an undercover agent's deceptive entry into a home is not violative of the Fourth Amendment unless there is an invasion of a reasonably held expectation of privacy. The facts of the instant case unequivocally reveal that no such invasion occurred. Con-

---

[2] While the State of Ohio is both petitioner and amicus in this case, briefs are being filed in both capacities because of the different perspective the state has in each capcaity. The petition for writ of certiorari was filed on behalf of the State of Ohio by the City Solicitor and City Prosecutor for Cincinnati, Ohio, as a part of their duty to enforce state criminal statutes. The amicus curiae brief is being filed by the Attorney General of Ohio because of the impact the Ohio Supreme Court's decision will have on criminal prosecutions throughout the state.

sequently, the result reached by the Ohio Supreme Court conflicts with the result compelled by a proper application of the *Lewis* decision.

In addition, the ruling in this case conflicts with the "misplaced confidence doctrine" which has emanated from *Hoffa v. United States,* 385 U.S. 293 (1966). Under this doctrine, a defendant cannot invoke the protection of the Fourth Amendment with regard to evidence that he voluntarily reveals to an undercover agent. This rule applies even when the undercover agent obtains the evidence while in the defendant's home as long as the agent does nothing to exceed the scope of his invitation. The application of this rule to the facts of the instant case likewise leads to the conclusion that the decision of the Ohio Supreme Court is erroneous.

The decision of the Ohio Supreme Court not only misapplies the precedent of this Court, but it also has crucial ramifications for the state's ability to enforce drug and other vice laws. For these reasons, it is imperative that this Court grant a writ of certiorari.

ARGUMENT

I. THE DECISION OF THE OHIO SUPREME COURT IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *LEWIS v. UNITED STATES,* 385 U.S. 206 (1966) AND *HOFFA v. UNITED STATES,* 385 U.S. 293 (1966).

The primary authority over the issue in this case is *Lewis v. United States,* 385 U.S. 206 (1966). In *Lewis,* a federal narcotics agent misrepresented his identity to the defendant in order to effectuate a drug sale. The defendant subsequently invited the agent into his home where the sale was consumated. Following his arrest, the defendant moved to suppress the marijuana that he sold to the agent on the ground that the agent's warrantless entry into his home constituted a violation of the Fourth Amendment. Recognizing that the use

of deception is a necessary tool for the enforcement liquor and narcotics laws, this Court concluded that there was no Fourth Amendment violation. *Id.* at 210-12.

Despite the factual similarity between *Lewis* and the instant case, the Ohio Supreme Court held that it was a violation of the Fourth Amendment for the police to employ deception in order to receive an invitation into the fraternity house. *State v. Pi Kappa Alpha Fraternity,* 23 Ohio St.3d 141 (1986). In reaching this conclusion, the court construed *Lewis* to mean that deception can only be used to gain entry into a home when the home has been converted into a commercial center of criminal activity and the occupant of the residence extends the invitation for the purpose of conducting illegal business. *Id.* at 143. This overly narrow interpretation of *Lewis* led the court to an erroneous decision.

According to the Ohio Supreme Court, any home which has not been converted into a commercial center of criminal activity is protected from undercover investigations. Such a narrow interpretation of *Lewis* controverts the well-established principle that the Fourth Amendment protects people, not places. *Katz v. United States,* 389 U.S. 347, 351 (1967). A more plausible interpretation of *Lewis* is that the conversion of the home into a place of criminal activity and the subsequent invitation for the purpose of engaging in the criminal activity were factors which indicated that the government had done nothing to infringe upon the sanctity or privacy of the defendant's home. *See, Lewis,* 385 U.S. at 213 (Brennan, J., concurring). Therefore, the dispositive issue under *Lewis,* as later developed in *Katz,* is whether the government has intruded upon an area in which the defendant holds a reasonable expectation of privacy.

Applying this principle to the facts of the instant case compels a result which is contrary to the one reached by the Ohio Supreme Court. The house manager of the defendant fraternity invited two men whom he did not know into the house. He proceeded to give them a guided tour and clearly had no reservations about showing the soft drink machine

which sold cans of beer. These circumstances lead inescapably to the conclusion that the members of the fraternity did not have a reasonable expectation of privacy with respect to the area where the soft drink dispenser was located.

The proposition that the Ohio Supreme Court misconstrued *Lewis* is made further apparent when *Lewis* is read in conjunction with *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, the Court held that the Fourth Amendment does not protect a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Id.* at 302. This rule, which the circuit courts have since designated as the "misplaced confidence doctrine," has been held to sanction the use of deception in order for the government to gain entry into a personal residence. *Jones v. Berry*, 722 F.2d 443 (9th Cir. 1983), *cert. denied*, 104 Sup.Ct. 2343 (1984); *United States v. Schuster*, 684 F.2d 744 (11th Cir. 1982), *cert. denied*, 104 Sup.Ct. 1008 (1984); *United States v. Shields*, 675 F.2d 1152 (11th Cir.), *cert. denied*, 459 U.S. 858 (1982).

In *Berry*, a special agent for the Internal Revenue Service posed as a prospective business purchaser in order to acquire information about a businessman who was suspected of tax fraud. The agent managed to obtain an invitation to the defendant businessman's home where the defendant revealed records to the agent which confirmed the suspicion of the IRS that the defendant was engaging in tax fraud. Based on the agent's observations at the defendant's home, a search warrant was obtained and the records were seized.

In rejecting the defendant's argument that probable cause was established on the basis of an illegal search, the court acknowledged that an undercover agent may exceed the bounds of the misplaced confidence doctrine if he searches for evidence not voluntarily revealed. *Id.* at 447. However, in the absence of such circumstances, no expectation of privacy is afforded to a person who voluntarily reveals incriminating evidence to an undercover agent. *Id.* at 447-48. Therefore, if an undercover agent is invited into a personal residence and he does not search for anything that exceeds

the scope of his invitation, there is no violation of the Fourth Amendment.

The facts of the instant case disclose that the undercover police officers did nothing to exceed the scope of their invitation. The agents were extended an invitation for the purpose of receiving a tour of the house. It was during the course of their tour that they observed the machine which was being used for the illegal sale of beer. Having stayed within the parameters of their invitation, the agents did nothing to abridge the Fourth Amendment.

The foregoing analysis demonstrates that the Ohio Supreme Court misapplied *Lewis* by failing to address the issue of whether the state violated a reasonable expectation of privacy held by the defendant — an issue which is germane to the resolution of a Fourth Amendment challenge. When the facts of this case are viewed in light of *Lewis, Hoffa,* and the circuit court decisions which have interpreted those cases, it becomes clear that the undercover agents did not encroach upon any expectations of privacy in acquiring the evidence that they removed from the fraternity house. Thus, if the precedent of this Court had been properly applied, no Fourth Amendment violation would have been found. In order to rectify the improper interpretation of its decisions, this Court must grant certiorari.

II. THE OHIO SUPREME COURT'S DECISION WILL SERIOUSLY IMPAIR THE STATE'S ABILITY TO ENFORCE ITS VICE LAWS.

The decision of the Ohio Supreme Court essentially mandates that undercover investigations must hault at a suspect's doorstep unless the suspect's home is converted into a center of criminal activity and the invitation to enter the home is made for the purpose of engaging in the illegal activity. The potential ramifications of this decision must be viewed in light of the direct relationship that exists between the use of undercover investigations and the enforcement of

liquor, drug, and other vice laws. Because these laws are directed at consensual crimes where there are normally no witnesses, the employment of undercover agents, as recognized by this Court, is essential to their enforcement. *See, Maryland v. Macon,* 105 S.Ct. 2778, 2782 (1985); *Lewis v. United States,* 385 U.S. 206, 211 (1966); *see also,* Webster, *Sophisticated Surveillance — Intolerable Intrusion or Prudent Protection?,* 63 Wash. U.L.Q. 351, 360-61 (1985). Moreover, the nature of undercover operations often makes it necessary for an agent to carry on his investigation in a suspect's home. Thus, if undercover agents are precluded from retrieving evidence out of a suspect's home, the state's ability to enforce its vice laws will be frustrated.

In short, the Ohio Supreme Court's ruling will transcend its application to the facts of the instant case and have a pervasive impact on vice law enforcement. Therefore, in view of the practical significance of this ruling, a writ of certiorari must be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

GENE W. HOLLIKER
Assistant Attorney General
Counsel of Record

THOMAS J. O'CONNELL
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

ATTORNEYS FOR AMICUS CURIAE STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Amicus Curiae, State of Ohio, have been served by U.S. Mail, postage prepaid, on this _____ day of July, 1986, on the following counsel of record:

Richard A. Castellini
Paul J. Gorman
Terrence R. Cosgrove
Room 200A, Alms & Doepke Bldg.
222 E. Central Parkway
Cincinnati, Ohio 45202

COUNSEL FOR PETITIONER, STATE OF OHIO

Elizabeth E. Agar
Croswell & Adams Co., L.P.A.
1400 American Bldg.
30 East Central Parkway
Cincinnati, Ohio 45202

COUNSEL FOR RESPONDENT, PI KAPPA ALPHA FRATERNITY

GENE W. HOLLIKER
Assistant Attorney General